

PE1745/B

Law Society of Scotland submission of 11 November 2019

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Government regarding the Public Petition No. PE 01745: Statutory Right for Families to Request a Fatal Accident Inquiry (FAI) (the Petition). The committee has the following comments to put forward for consideration.

General

The Public Petition Committee considered the Petition at its meeting on 10 October 2019¹ when that committee resolved to consider the Petition, having requested further information from various organisations including the Society. From our perspective, the background to the Petition relates to the parliamentary scrutiny of the then Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill. The Society observed that consideration could be given to providing family members with a statutory right to seek a FAI. The Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (the 2016 Act) does not include any such provisions. We set out the statutory background to how the decision is made to hold a FAI. We then consider the issues which would need to be considered if such a statutory right was to be provided which focuses on the purpose of holding a FAI, how such a right would be exercised, and consideration as to the definition of family for these purposes.

The decision to hold a FAI

The issue of a family having a statutory right to request a FAI would only arise in the circumstances where consideration was given to the holding of a discretionary FAI under section 4 of the 2016 Act.² That states a FAI is to be held into the death of a person in Scotland if the Lord Advocate considers:

¹ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12321>

² In mandatory FAIs under the 2016 Act, there is no discretion afforded to the Lord Advocate as to the circumstances where a FAI must be instructed. Accordingly, there would be no need for a statutory right to be included but comments which we include may be relevant when considering representation at such a FAI as to what the term "family" would include.

- (a) that the death (i) was sudden, suspicious or unexplained, or (ii) occurred in circumstances giving rise to serious public concern and (our emphasis)
- (b) decides that it is in the public interest for an inquiry to be held into the circumstances of the death.

The discretion as to making the decision whether to hold a FAI lies with the Lord Advocate. That decision will be taken following an investigation (and report prepared following investigation) by the Crown Office and Procurator Fiscal Service (COPFS)³ into the sudden, suspicious or unexplained death. That report will include the witnesses and other relevant statements and expert's or specialist's reports. That report as well as outlining the circumstances and background of the death will make recommendations to the Lord Advocate as to whether a FAI should be held. The families' views will be ascertained in meetings with COPFS staff following the completion of such investigations and represented before any decision is taken by the Lord Advocate. The families' views are a factor in the decision-making process but not paramount⁴ either way - namely, against or for holding a FAI. The COPFS has provided useful information about procedures in its Family Charter: Charter to Bereaved Relatives: Access to Information and Liaison with the Procurator Fiscal⁵ in the implementation of section 8 of the 2016 Act.

In effect, what the Petition seeks is to ensure that obtaining these views and making a request for a FAI would be enshrined as a statutory right rather than rely on the COPFS commitment that exists at present.

Section 4 of the 2016 Act needs to be satisfied before a FAI will be held into a death. That is a two-stage process whereby the death requires to satisfy subparagraph (i) or (ii) and then a FAI is justified in the public interest. The term "public interest" is not of course defined and is replicated in the discretion afforded to the Lord Advocate on making decisions whether a prosecution is to be initiated in the public interest.

We cannot agree that it is a "vague term" as outlined in the Petitioner's submission PE1745/A of 17 October 2019.⁶ It may be a term that is not well understood by the public, but assigning a normal meaning the public interest is wider than the family interest though there may well be an inevitable overlap.

In practice, discretionary FAIs are held into all manner of deaths. No category of death is excluded. Recent examples of discretionary deaths⁷ include deaths arising from road traffic accidents (where one related to concerns over driver fatigue⁸) and a

³ Scottish Fatalities Investigation Unit COPFS. *Death and the Procurator Fiscal*. 2008. Section 6(ii)(b). http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/Death%20and%20the%20PF.pdf

⁴ Paragraph 29 *Emms v Lord Advocate* [2011] CSIH 7.

⁵ <https://www.copfs.gov.uk/images/Documents/Deaths/COPFS%20Family%20Liaison%20Charter%20September%202016.pdf> Paragraph 6.7

⁶ Paragraph 3

⁷ <https://www.scotcourts.gov.uk/search-judgments/fatal-accident-inquiries>

⁸ <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019fai34.pdf?sfvrsn=0> Death of John Fraser Nisbet Death of David Michael Reid <https://www.scotcourts.gov.uk/search-judgments/judgment?id=70fc66a7-8980-69d2-b500-ff0000d74aa7>

medical death.⁹ Tracking over the FAIs held since last year, only two seem to fall into the discretionary category; this may be since there has been a concentration on holding FAIs into the mandatory circumstances of a death in custody.

By providing the families with a right to request a FAI, these could potentially be requested in a number of cases. It might be difficult to restrict the exercise of such rights as many deaths can potentially fall into the category of a sudden, unexpected or suspicious death where the family may wish a FAI but there would be no public interest in holding such a FAI. Examples could include a sudden death from a heart attack. The death is of course a tragedy for the family but the circumstances in that case may not be such as to justify any FAI. However, such a death could give rise to public interest factors where the person may have survived had the ambulance arrived on time and medical assistance or a defibrillator had been available at the location where the person died.

No evidence has been produced to show if such a right was to be granted to the family how many such deaths would give rise to the exercise of any statutory right. What would be useful would be to ascertain:

- The numbers of requests made for a FAI to be held in deaths that have been investigated by COPFS and where such FAIS have been refused by the Lord Advocate
- The commonly occurring reasons why the holding of a FAI into such a death have been declined by the Lord Advocate. That information should be available now since the commencement of the 2016 Act as under section 9 of the 2016 Act, COPFS, if requested, require to give reasons for their refusal to hold a FAI.

If a statutory right were to exist this would inevitably impact on COPFS's staffing resources to handle such requests. This is before any consideration is given to other issues which would arise as to court proceedings, determination of who are the family and any increase in the number of FAIs that would be held, as discussed below.

The purpose of holding a FAI

Article 2 of the European Convention on Human Rights sets out:

“Everyone's right to life shall be protected by law.”

Scotland complies with its state's obligations by providing a statutory FAI mechanism under the 2016 Act that is transparent and public. In *Kennedy v Lord Advocate*,¹⁰ it stated that:

“The jurisprudence of the European Court of Human Rights did not require a state to initiate an investigation in every case in which an individual had died

⁹ <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019fai14.pdf?sfvrsn=0> Death of Dawn Marshall

¹⁰ *Kennedy v Lord Advocate* Black v Lord Advocate [2008] CSOH 21

after having been treated and cared for in hospital, but a state did require to put in place a system that provided for the practical and effective investigation of the facts of such a death and the determination of civil liability.”

However, the public do not necessarily understand that a FAI is not designed to be an all-encompassing inquiry into all aspects of the death. The purpose in holding a FAI is set out under section 1 (2) of the 2016 Act that states:

- (a) To establish the circumstances of the death
- (b) To consider what steps (if any) might be taken to prevent other deaths in similar circumstances.

The sheriff presiding over the FAI, at its conclusion, must issue a determination under section 26(2) of the 2016 Act which will include their findings as to the circumstances¹¹ of the death and any recommendations.¹² That provides a further context for the FAI. Families are inevitably concerned to ensure that lessons are learnt from a death and it is to the FAI determination that these results may be best seen.

There are limitations as to the scope of FAIs which have also been recognised by Sheriffs. The then Sheriff Derek CW Pyle stated that their purpose was not to find fault as:

‘[Later] litigation [can be pursued] where the normal rules apply of advance notice in writing of each party’s case and control of the manner evidence is presented to the court.’¹³

Blame is not therefore apportioned as part of the FAI process or the determination which are issues that are not fully appreciated by the families in making any request for a FAI. A range of legal actions may arise. These include civil claims such as a personal injury insurance claim or hospital complaint in relation to a medical death or a criminal prosecution under the health and safety legislation in relation to a death at work.¹⁴ The holding of a FAI may therefore not necessarily offer a panacea to the deceased’s relatives.

Before families would be granted any such statutory rights, there would need to be much better public understanding and awareness of the purpose and exactly what a

¹¹ The circumstances are outlined in section 26(2) of the 2016 Act.

¹² The scope of the recommendations is outlined in section 26(4) of the 2016 Act.

¹³ FAI into the death of Michel Dodds - Dundee 11 August 2009 quoting *Black v Scott Lithgow* 1990 S.L.T. 612 at pp 615 where Lord President Hope said: “There is no power ... to make a finding as to fault or to apportion blame between any persons who might have contributed to the accident.. It is plain that the function of the Sheriff at a [FAI] is different from that he is required to perform at a proof in a civil action to recover damages. His examination and analysis of the evidence is conducted with a view only to setting out in his determination the circumstances, in so far as this can be done to his satisfaction. He has before him no Record or other written pleading, there is no claim of damages by anyone and there are no grounds of fault upon which his decision is required.”

¹⁴ Alison Hume’s death in a mineshaft in 2008 illustrates the effect of a determination in a FAI. Her death was as a result of a delay in rescuing her following which the then Community Safety Minister, Roseanna Cunningham, indicated that ‘lessons have been, and will continue to be, learned from the tragic event’. ‘[Later] litigation [can be pursued] where the normal rules apply of advance notice in writing of each party’s case and control of the manner evidence is presented to the court’. The deceased’s family may well be disappointed ‘that blame has not been apportioned’.

FAI can achieve. The Society reflecting concerns over delays in decisions being made to hold FAIs called in April 2019¹⁵ for:

“promotion [being] needed of why the [FAI] is being held and that it requires to be held timeously. That then meets the state and public expectations of the inquiry. It is the ultimate objectives of the FAI system in Scotland, more than the process, that need to be addressed.”

It should be remembered that in certain circumstances, that it is possible to broaden out the scope of the inquiry into a death such as those deaths at the primary school in Dunblane where the inquiry was instructed under the Inquiries Act 2005.¹⁶

How such a right would be exercised

Under section 29 of the 2016 Act, Scottish Ministers are required to report on the number of inquiries concluded in the previous financial year. The most recent statistics show for the period from 15 June 2017 (the commencement date of the 2016 Act) to 31 March 2018 that the number of FAIs held was twelve which is substantially down on the estimated 50- 60 FAIs said to be held annually.

Exactly why there are well publicised delays¹⁷ in decision making and holding FAIs may provide part of the background to the Petition. In August 2019, the Inspectorate of Prosecution in Scotland published a follow-up report on FAIs revisiting their 2016 Report where Michelle McLeod, HM Chief Inspector indicated (as well as indicating the need to follow up with a further report in 2020) that:

“Failing to deal with FAIs expeditiously not only impacts on nearest relatives, it causes distress and concern for potential witnesses who may have to give evidence at the FAI and, in some cases, undermines public confidence in the inquiry.”

Until these issues of delay are fully addressed and resolved, the exercise of any such statutory right would inevitably give rise to more FAIs as well as more resources in the investigation and decision-making stage of the process. What is also unclear is when such a right would be operational. We outline options as follows:

- at the time of the death, which would not seem appropriate as the result of investigations and decisions as to public interest factors would be unknown.
- at the completion of the investigation into the death, which would reflect what in fact currently exists as outlined above.
- at the completion of the investigation, following the refusal to hold a FAI and receipt of reasons, might provide the best circumstances in which such a right

¹⁵ <http://www.journalonline.co.uk/Magazine/64-4/1027152.aspx#.XcP3w-Q3aUk>

¹⁶ Section 5 of the Inquiries Act 2005 offers a wider scope for any inquiry as it allows it to set its own terms of reference.

¹⁷ <https://www.scotsman.com/news-2-15012/revealed-eight-year-agonny-of-delayed-fais-1-4866695>

should be exercised. We understand that this would replicate the grounds for a judicial review into the refusal of the Lord Advocate to hold a FAI.

What the Petition would appear to seek to replace would be the need for holding a judicial review. The process that is envisaged would seem simpler in that the request would be considered by a sheriff who would be the arbiter as to determining if the death giving rise to the potential FAI met the criteria and satisfied the public interest factor. That seems in effect the same as the judicial review process, being the process under which the Lord Advocate's actions are subject to review by the judiciary. These may result in a refusal of the petition as in *Niven v Lord Advocate*¹⁸ where a request for a FAI into the circumstances of a death where there had been a criminal prosecution for murder was refused on the grounds that:

- The wider public interest element was absent. There were questions as to certain matters concerning the investigation into the death, but these were separate from the circumstances of the death and did themselves raise issues of a wider nature such as to justify the petition.
- Article 2 did not oblige the Lord Advocate to order a further inquiry into the death in the absence of any significant additional information or new suggested lines of inquiry.

The shrieval process may be somewhat less expensive as actions would lie to a sheriff as opposed to a judge in the Court of Session. There would still be cost implications as to the funding of that process and the court hearing from the family's perspective with further cost implications for COPFS and the Scottish Courts and Tribunal Service. These would all need to be quantified before the whole financial implications of such a process were considered.

There is a need too to consider the legal aid implications as to the responsibility for families to meet the cost of legal advice and assistance, let alone representation in court. Deaths inevitable raise emotional issues so it would seem likely that any such process would trigger the requirement for legal representation. This does accord with the Scottish Government's recently concluded consultation into legal aid which included a question relating to the provision of legal aid and FAIs. The Society responded indicating that:¹⁹

“Under the current arrangements, [Scottish Legal Aid board] has no flexibility to decide whether to disapply or disregard the statutory requirements that operate to assess an applicant's finances [in FAIs]. Application of the criteria may mean some families receive legal aid while others do not in the same inquiry. What that means for the public is a perception that the grant of legal aid in connection with FAIs is random.”

¹⁸ [2009] CSOH 110

¹⁹ <https://www.lawscot.org.uk/media/363609/19-09-19-la-consultation-legal-aid-reform.pdf>

Consideration would need to be given as far as the exercise of such rights and legal aid to ascertain if this should be provided free from any civil legal aid assessment as to the financial means or case criteria.

Definition of the family

It is uncertain as to who exactly who would be able to exercise this right.

Under section 11 of the 2016 Act, persons who can participate in a FAI (where A is the person who has died) include:

- (a) A's spouse or civil partner at the time of A's death
- (b) a person living with A as if married to A at the time of A's death
- (c) A's nearest known relative if, at the time of A's death, A (i) did not have a spouse or civil partner and (ii) was not living with a person as if married to the person.²⁰

The sheriff has a discretion where they are satisfied to allow participation by another person who has an interest in the FAI.

Would the rights envisaged in the Petition be framed narrowly to allow only one person to exercise such a right? Issues or conflict may arise in families between siblings and children of the deceased where the husband or wife is unfit.

Further issues arose recently in the Clutha FAI²¹ where Sheriff Principal Turnbull²² refused a motion from Mrs. Evelyn Mitchell²³ to participate in the FAI as:

“the arguments advanced in support of the application [were] without merit. They do not set out a basis upon which it could be legitimately inferred that the [Mrs Mitchell’s] participation would further the purpose of the inquiry, namely, (a) to establish the circumstances of the death and (b) to consider what steps (if any) might be taken to prevent other deaths in similar circumstances.”

Other aspects

Responding to the Petitioner’s submission PE1745/A, we would respond to various points as follows:

Judicial Review: we accept that a judicial review presents the only means to review the exercise of the Lord Advocate’s discretion. Such actions can inevitably be expensive and legal aid may not be available. If a judicial review were to find against the Lord Advocate, it seems unlikely, following that review, the Lord Advocate would not decide to instruct a FAI.

²⁰ Section 9 of the 2016 Act has similar provisions.

²¹ <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019fai46.pdf?sfvrsn=0>

²² <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018scgla55.pdf?sfvrsn=0> [2018] SC GLA 55

²³ half-sister of the deceased pilot of the helicopter David Iain Traill

Coroner system: The English and Welsh system is different from Scotland, and although similar, does not necessarily afford a direct comparison. The Ministry of Justice has provided a short guide²⁴ to the system that may be helpful in indicating that the Coroner is involved where the death is reported to them when it appears that: the death was:

- violent or unnatural
- the cause of death is unknown
- the person died in prison, police custody, or another type of state detention.

These grounds of deaths accord with the COPFS role in the reporting and investigating deaths.

The Coroner as for COPFS will investigate the death. It is important to stress and understand the role of the Lord Advocate and COPFS.²⁵ The Lord Advocate is the ministerial head of COPFS, leading the system of the investigation of deaths. The Lord Advocate is a Minister of the Scottish Government and acts as principal legal adviser, but decisions by him about the investigation of deaths are taken independently of any other person. That independence of decision-making is crucial which is reflected in the role of the Coroner.

Where it is not possible to find out the cause of death from the post-mortem examination, or the death is found to be unnatural, the Coroner must hold an inquest. An inquest is a public court hearing held by the Coroner in order to establish who died and how, when and where the death occurred.²⁶ Section 4 of the Coroners and Justice Act 2009²⁷ states that (1) A senior coroner who is responsible for conducting an investigation into a person's death must discontinue the investigation if:

- (a) an examination reveals the cause of death [following the post-mortem examination] before the Coroner has begun holding an inquest into the death and
- (b) the Coroner thinks that it is not necessary to continue the investigation.

This is similar to the Scottish position in that the Coroner has the discretion to decide that the investigation need not continue whereupon no inquest would follow. It is also important to note that the only review of that decision would also be by way of judicial review in the High Court, where a senior Judge can review the lawfulness of a decision taken. It is a review of the way the decision was made, rather than the rights and wrongs of the conclusion reached.

²⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/283937/coroner-investigations-a-short-guide.pdf

²⁵ <https://www.copfs.gov.uk/about-us/who-we-are>

²⁶ <https://www.gov.uk/government/publications/guide-to-coroner-services-and-coroner-investigations-a-short-guide>

²⁷ <http://www.legislation.gov.uk/ukpga/2009/25/contents>